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In the

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 33.

HAROLD J. COOLIDGE AND AUGUSTUS P. LORING, TRUSTEES, *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 34.

SAME *v.* SAME.

BRIEF FOR HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

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HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 34.

SAME *v.* SAME.

APPEAL FROM THE PROBATE COURT OF NORFOLK COUNTY, STATE OF MASSACHUSETTS.

BRIEF FOR HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

INTRODUCTION.

The issues of law involved in these two cases are identical, and there is no substantial difference upon the facts. Case No. 33 relates to the Massachusetts legacy and succession tax on the interest passing under a trust deed in property

furnished by Julia Coolidge. Case No. 34 relates to the same tax on the interest passing under the same trust deed in property furnished by J. Randolph Coolidge. The cases are both argued in this one brief. References to pages of the Record are to the Records in both cases, the page numbering in each being practically identical.

Opinion Below.

These cases were reserved without decision by the Probate Court for the County of Norfolk for the determination of the Supreme Judicial Court for the Commonwealth of Massachusetts (R. 12), and were heard by the Supreme Judicial Court prior to the entry of final decrees after rescript (R. 14 and 23) in the Probate Court. The opinion is reported in 1929 Massachusetts Advance Sheets, p. 1831, but has not yet been printed in the bound volume of the Massachusetts reports. It may also be found in 167 Northeastern Reporter, 757.

Jurisdiction.

The appellants, in accordance with paragraph 1 of Rule 12 of the Revised Rules of this Court, duly filed statements disclosing the alleged basis of the jurisdiction of this Court; and this Court made on March 10, 1930, a finding of probable jurisdiction in each case. Counsel here make no contention that this Court has not jurisdiction to review the final decrees of the Probate Court for the County of Norfolk in these causes.

Statement of the Cases.

The appellants are trustees under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge, Julia Coolidge, and the appellants (R. 5). By that deed real and personal estate was transferred to the trustees by

the settlors voluntarily, and not as a bona-fide purchase for full consideration in money or money's worth (R. 6). Three-sevenths of the trust property was furnished by Julia Coolidge and four-sevenths by her husband, J. Randolph Coolidge (R. 6).

By its terms the trust instrument provided, in substance, for the payment of the income of the trust to the settlors, J. Randolph Coolidge and Julia Coolidge, for their joint lives, in the respective portions of four-sevenths and three-sevenths; the entire income was to go to the survivor; and upon the death of the survivor the trust property was to be divided equally among the five children of the settlors (R. 8). It was provided, in substance, that, if any of the children should die before the surviving settlor, the interest of such deceased child should go to the heirs of the deceased, determined according to the statute of distributions in effect at the time of the death of such survivor (R. 8). There was no power of revocation, modification, or termination. A copy of the trust may be found on pages 6-10 of the Record.

By instrument of assignment executed on April 6, 1917, the settlors assigned all their interest in the trust funds and all their right to receive the income therefrom to the five ultimate beneficiaries, all of whom eventually survived to take their distributive shares (R. 6). A copy of the assignment may be found on pages 10-12 of the Record.

Julia Coolidge died January 6, 1921, and J. Randolph Coolidge died November 10, 1925, both residents of Brookline, Massachusetts (R. 5 and 6). The appellee Commissioner determined that the appellants were subject, as of November 10, 1925, to excise taxes under G.L., c. 65, § 1, as amended, upon the three-sevenths and four-sevenths of the trust estate furnished, respectively, by each settlor (R. 6). It is the validity of these taxes which is here in issue. There is no controversy as to the amount of the excise, if any is due (R. 6).

The taxes assessed to the appellants on account of the interest passing from Julia Coolidge amounted to $20,082.01, and on account of the interest passing from J. Randolph Coolidge to $25,201.82. Both taxes were paid by the appellants under protest on November 10, 1926 (R. 6). They filed petitions, later amended, for abatement of the taxes, in the Probate Court for the County of Norfolk (R. 2-4). The Probate Court, without making any decision, reserved all questions of law presented by the cases for the determination of the Supreme Judicial Court of the Commonwealth (R. 12). The Supreme Judicial Court, after hearing, sent down rescripts directing that decrees be entered denying each petition for abatement (R. 14). In accordance with the rescripts, the Probate Court dismissed each petition (R. 23 and 24), from which decrees these appeals were made to this Court (R. 24-26).

History of Legislation.

At the time the trust was created, namely, July 29, 1907, there was no statute operative under which the trust property could have been subjected to an excise, because the succession was to direct descendants of the settlors. Statutes then in force provided for the levy of an excise only where the succession was to collateral relatives and strangers. Such a statute had long been in force in Massachusetts,

St. 1891, c. 425,

and provided:

> *Section 1.* "All property within the jurisdiction of the Commonwealth, . . . which shall pass . . . by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person . . . other than to or for the use of the . . . lineal descendant . . . of a decedent, . . . shall be subject to a tax . . ."

The type of trust, therefore, that was executed by the Coolidges on July 29, 1907, had long been recognized as taxable by Massachusetts statutes. If the succession in the Coolidge trust had been to collateral heirs or strangers, the trust would clearly have come within the provisions of the 1891 statute and been taxable.

Furthermore, a legacy and succession tax upon direct descendants had been enacted by the Massachusetts Legislature on June 27, 1907, slightly more than a month prior to the creation of the trust, to take effect on September 1, 1907, about five weeks after the date of the trust.

St. 1907, c. 563.

This is the first relevant statute. Its provisions included direct descendants within the meaning of "person" for the first time, and in other pertinent particulars were:

> *Section 1.* "All property within the jurisdiction of the Commonwealth . . . which shall pass by . . . deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person . . . shall be subject to a tax . . ."
>
> *Section 25.* "This act shall not apply to estates of persons deceased prior to the date when it takes effect, or to property passing by deed, grant, sale, or gift made prior to said date . . ."
>
> *Section 27.* "This act shall take effect on the first day of September in the year nineteen hundred and seven."

It is obvious that the Coolidge trust was created in an attempt to escape the tax imposed by the 1907 statute. This is especially apparent from its provisions, which included within the trust any property which might in the future be

conveyed to the trustees by the Coolidges prior to September 1, 1907 (R. 7).

The provisions of the 1907 statute, under which the Coolidge trust would not have been taxable because created prior to September 1, 1907, were amended in 1912,

St. 1912, c. 678,

from the time of which amendment the Coolidge trust has been clearly within the provisions of the Massachusetts legacy and succession tax law. Section 1 of the 1912 statute amended section 1 of the 1907 statute in particulars not here material; and it was then provided:

> *Section 3.* "The provisions of section one of this act shall apply to the estates of all persons dying subsequent to the passage hereof, and to all property passing by deed, grant, sale or gift except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, *if such death occurs subsequent to the passage hereof . . .*" (Italics ours.)

The fact that the Coolidge trust was executed prior to September 1, 1907, thus became of no importance in 1912, and has so remained ever since. After the enactment of the act of May 29, 1912, the Coolidge trust was clearly taxable in spite of the fact that the trust instrument was executed prior to September 1, 1907.

Furthermore, in 1914 the significance of the date, September 1, 1907, in its relation to the creation of the trust was eliminated.

St. 1914, c. 563.

By this amendment the Massachusetts legacy and succession tax statutes imposing a tax upon a gift made or intended to take effect in possession or enjoyment after death

provided that there should be an exemption from taxation only where the death of the grantor occurred prior to September 1, 1907. The pertinent section of the 1914 amendment was:

> *Section 1.* "This part [the amended 1907 statute] shall not apply to . . . property passing by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor when such death occurred prior to said date [September 1, 1907] . . ."

The relevant statutory provisions applicable to the taxes, the validity of which is in issue here, are in G.L., c. 65, entitled "Taxation of Legacies and Successions," as follows:

> *Section 1.* "All property within the jurisdiction of the commonwealth . . . which shall pass by . . . deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax . . ."
>
> *Section 36.* "This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty . . ."

There have been no amendments to G.L., c. 65, in any particular here material.

The deaths of both Julia Coolidge and J. Randolph Coolidge, in connection with whose estates the taxes were assessed and paid, occurred subsequently to May 4, 1920, the effective date for the application of G.L., c. 65, § 1, to property passing upon death. It is under this statute that the taxes were determined.

Summary of Argument.

I.

The Massachusetts legacy and succession tax statute as construed by the Court below is valid under the Constitution of the United States as a succession tax upon the exercise of the privilege of receiving in 1925 property passing dependently upon the death of the settlors under a trust created in 1907.

II.

The imposition of such an excise here does not deny to the appellants the equal protection of the laws nor deprive them of property without due process of law nor impair the obligation of a contract, under the Constitution of the United States.

Points and Authorities.

I.

THE MASSACHUSETTS LEGACY AND SUCCESSION TAX STATUTE AS CONSTRUED BY THE COURT BELOW IS VALID UNDER THE CONSTITUTION OF THE UNITED STATES AS A SUCCESSION TAX UPON THE EXERCISE OF THE PRIVILEGE OF RECEIVING IN 1925 PROPERTY PASSING DEPENDENTLY UPON THE DEATH OF THE SETTLORS UNDER A TRUST CREATED IN 1907.

There is no doubt, and it has been properly conceded by the appellants in their brief (p. 7), that the Massachusetts legacy and succession tax statute was properly construed by the Court below as imposing a succession tax upon the passing of the Coolidge trust property in 1925.

The Coolidge trust indenture must be here considered, therefore, to be a deed, grant or gift, without full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, under the provisions of the Massachusetts succession tax statute. It was stipulated by all

parties that the Coolidge "transfer was voluntary and was not a bona fide purchase for full consideration in money or money's worth" (R. 6).

This Court accepts the construction placed upon the Massachusetts excise statutes by the Court below.

Chanler v. *Kelsey*, 205 U.S. 466, 477.
Stebbins v. *Riley*, 268 U.S. 137, 146.

It will therefore accept the decisions of the Massachusetts Court that these statutes impose an excise upon the privilege of succession and that such privilege of succession is not fully exercised until the gift takes effect in possession and enjoyment.

It should be borne clearly in mind that the Massachusetts excise tax is a tax upon the right to receive. It was early pointed out in

Crocker v. *Shaw*, 174 Mass. 266,

that the Massachusetts statute of 1891, the first inheritance tax statute in Massachusetts, was an excise upon the privilege of (1) disposing of property after death, and (2) succeeding to it, the Court holding it to be immaterial that the trusts in that case were dated and executed prior to the passage of the 1891 statute, saying:

> "It is the vesting of the property in possession and enjoyment on the death of the grantor and after the statute took effect, that renders it liable to the tax."

So, too, in

Attorney General v. *Stone*, 209 Mass. 186,

the Massachusetts Court said, regarding this tax:

> "This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with. The privilege is

not fully exercised until the property shall have come into the possession of the beneficiary."

Again, in

Clarke v. *Treasurer and Receiver General*, 226 Mass. 301,

the Court made the following statement with regard to the theory of the Massachusetts inheritance tax:

"The excise tax is laid on the privilege of receiving the legacy by will. That is the 'commodity' which is taxable. It has been held that the passing into possession and enjoyment of such property is subject to such taxation even though the instrument under which the property passes was executed and effective before the statute imposing the excise was enacted."

This Court has, furthermore, accepted the theory of the Massachusetts excise as a succession tax in the opinion of Mr. Justice Stone in the case of

Saltonstall v. *Saltonstall*, 276 U.S. 260.

The Commonwealth contends that this *Saltonstall* case is clearly decisive of the validity of the excise here attacked. Mr. Justice Stone cited numerous Massachusetts decisions as to the character of the excise, pointed out the difference between the Federal estate tax involved in the case of *Nichols* v. *Coolidge*, 274 U.S. 531, and the Massachusetts succession tax involved in the *Saltonstall* case, and stated:

"But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, . . . but with a tax on the privilege of succession . . . The present tax is not laid on the donor but on the beneficiary; the gift taxed is not one

long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor . . .

"So long as the privilege of succession has not been fully exercised it may be reached by the tax."

Since the Massachusetts excise is imposed on the succession to property by the beneficiaries, it necessarily follows that it makes no difference when the trust was executed under which the succession takes place. As long as the statute imposing the excise is enacted prior to the receipt by the beneficiaries of the property, a valid excise may be imposed upon such receipt.

For an extreme instance of the imposition of the Massachusetts succession tax upon the passing of property even where the decedent died before the enactment of the taxing statute, see

Magee v. *Commissioner of Corporations and Taxation*, 256 Mass. 512:

The statute involved in this case took effect on July 22, 1919. It was applied to the will of a testatrix who died on July 6, 1919. The will was allowed on August 4, 1919. In holding valid the excise as so applied, the Massachusetts Court said:

"The statute here attacked as applied to the estate of the testatrix is not open to objections on constitutional grounds. It does not in truth operate retroactively with reference to the present estate. The tax was imposed upon a commodity still in existence when the statute went into effect."

The *Saltonstall* case seems to be clear authority in defense of the present excises from attack on the ground that the Coolidge trust was enacted prior to the passage of

G.L., c. 65, § 1, which was applied to it. In the *Saltonstall* case the trust was executed similarly to the present Coolidge trust in 1905, 1906, and 1907. The settlor died January 27, 1920, and it was held that the statute of 1916 imposing a tax was valid with relation to the Saltonstall trust, the Massachusetts opinion, affirmed by this Court, stating:

> "The statute imposes an excise upon succession to property . . . Since the excise may be levied upon the commodity known as succession, it may validly be imposed so long as any part of that commodity remains in existence."
>
> *Saltonstall* v. *Treasurer and Receiver General*, 256 Mass. 519.

And, indeed, the Court below was of the opinion that its *Coolidge* decision was supported by the *Saltonstall* case:

> "Although the facts in the case at bar differ in some particulars from those in *Saltonstall* v. *Saltonstall*, 276 U.S. 260, we think that that decision supports the conclusion that these excises might be lawfully levied."
>
> *Coolidge* v. *Commissioner*, 1929 Mass. Adv. Sh. 1831, 1838.

This Court accepts and is bound by the construction placed by the Court below upon the deed of trust.

> *Nickel* v. *Cole*, 256 U.S. 222, 225.
> *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 164.

It is therefore not open to question here that the net trust estate passing to the five sons under the Coolidge trust took effect in possession and enjoyment on the death of the surviving settlor and is subject to the Massachusetts excise statute here imposed. The Court below clearly decided that the excise statute applied to the passing of the trust prop-

erty on November 10, 1925, under a trust executed on July 29, 1907. The language of the Court below on that point is helpful:

> "The settlors by the deed of July, 1907, divested themselves of all power of disposition over the principal of the trust. It then passed irrevocably from their control. After that they possessed only rights to the income. Thus they did not divest themselves of all interest in the property. They stripped themselves of those rights in April, 1917. That is not pertinent to the issues here involved because before that time *the statute had been changed as to taxation of successions so as to include the kind of succession established by the deed of July, 1907.* Confessedly at the time of the execution of the trust deed there was no statute exacting an excise on the transfer of the property or on succession to it. This, however, in our opinion is not a decisive factor. *The present excise under the statute was levied on the succession, not on the transmission, of the trust fund.* As already pointed out succession is a quite different thing from transmission. It is manifest from the terms of the declaration of trust that the death of the survivor of the settlors was expressly fixed as the effective date of succession by the final beneficiaries to the enjoyment of the principal and income of the trust estate. The excise statute here controlling . . . is designed to include within its sweep all methods of succession to property to take effect in possession or enjoyment after the death of the grantor or donor other than those made *inter vivos* for a bona fide consideration. By express words it embraces succession created by deed. *Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute.* The succession to any

of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity." (Italics ours.)

Coolidge v. *Commissioner,* 1929 Mass. Adv. Sh. 1831, 1834, 1835.

The argument that the taxes are invalid because retroactive in their application is erroneous and based upon an inaccurate understanding of the nature and theory of the Massachusetts legacy and succession tax. The Massachusetts excises are not imposed on the transfers of 1907 or 1917, prior to the enactment of the 1920 taxing statute, but on the receipt of the property in 1925, five years after the enactment of the 1920 statute. They are by no means retroactive taxes.

The Commonwealth further bases its succession taxes upon the ground that the remainders over to the five children could never have taken effect during the lifetime of the Coolidges. The remainders over were not independent of, but clearly dependent upon, the deaths of the Coolidges. And this is true although there was no power of revocation reserved in the original trust instrument, and although in April, 1917, the Coolidges gave up their rights to the income.

The tax is valid even though, after the 1917 assignment, and therefore at the time of the deaths of the settlors in 1921 and 1925, respectively, the Coolidge trust might fairly be said to be a trust to trustees to pay the income to the Coolidge children during the lives of Julia Coolidge and J. Randolph Coolidge, and the survivor, and then to the Coolidge children absolutely; with the provision that "if any of the Coolidge children should die before the time for distribution the heirs of any deceased child should take the parent's share."

The dependence of the interest of the remaindermen upon the deaths of the settlors was clearly shown when this Cool-

idge trust was before the Massachusetts Court in 1920 in the case of

Coolidge v. *Loring*, 235 Mass. 220.

From this case it appears that after the 1917 assignment the trustees were requested to convey the trust property to the five children, the ultimate beneficiaries, absolutely and free from any trust. This demand on the trustees for an immediate distribution of the fund was refused by reason of the "possible claim of a contingent interest on behalf of wives and children of sons predeceasing" the settlors. The Massachusetts Court refused to reform the instrument.

In the opinion of the Massachusetts Court in the present litigation, the dependence of the succession in this Coolidge trust upon the deaths of the settlors was clearly pointed out:

> "The assignment of their life interest in the income of the trust by the settlors to their sons in 1917 did not operate to alter the nature of the trust instrument or of the transaction out of which spring the rights of the final beneficiaries. *It is obvious that this assignment did not, even in combination with the trust instrument of July, 1907, vest the entire interest of the trust in the five sons.* . . . But manifestly the trust could not then terminate, because the succession could not take place or be ascertained until the death of the survivor of the settlors." (Italics ours.)
>
> *Coolidge* v. *Commissioner of Corporations and Taxation*, 1929 Mass. Adv. Sh. 1831, 1835.

It is true that the Coolidge trust is not the simple case of a gift to trustees to pay the income to the settlor for life and then over, as in

Crocker v. *Shaw*, 174 Mass. 266.

It is true that the Coolidges, by the deed of July, 1907, divested themselves of all power of disposition over the principal of the trust and stripped themselves of all interest in the income from the property by the assignment of April, 1917. But such a beneficial interest of the settlor in the income or a power of revocation is by no means necessary to the validity of the Massachusetts succession tax, as was decided by the Massachusetts Court in

State Street Trust Co. v. *Treasurer and Receiver General*, 209 Mass. 373:

> A conveyed property to trustees to pay the income to X and Y during A's life, and on A's death over, with no power of revocation. The Massachusetts Court held valid a tax upon the transfer over on A's death under this trust deed, and construed the Massachusetts tax in its effect upon trusts similar to the Coolidge one as follows:
>
> > "The test . . . by which . . . exemption [from the excise] is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property and to receive and use the proceeds, which by the express language of the statute subjects it to the tax. . . . The intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life."

So again the Massachusetts Court construed the Massachusetts succession tax statute involved in

New England Trust Co. v. *Abbott*, 205 Mass. 279:

A transferred property to a trustee to pay the income to X for periods of five years each, the trust to terminate at the end of the five-year period following the death of A, and upon such termination over to X absolutely. The passing of this property was also held taxable.

The Massachusetts Court in construing the statute involved here lays down the test that a succession tax is validly imposed where the property does not pass independently of the death of the original settlor. The Massachusetts doctrine seems clearly to be that where, as here, the death of the settlor is necessary to the passing of the property to the ultimate beneficiaries, the excise is rightly imposed.

Massachusetts cases in which this same statute is construed clearly show that the Coolidge trust was properly included within its provisions. The *State Street Trust Company* case deals definitely with the absence of a power of revocation, and states that it makes no difference, holding that the tax is valid notwithstanding. The *State Street Trust Company* and the *New England Trust Company* cases show that the 1917 assignment divesting the settlors of all beneficial interest in the trust makes no difference, that the tax is still valid.

The fact that Julia Coolidge died in 1921, while the property did not pass until 1925, makes no difference according to the construction of the statute by the Massachusetts Court.

New England Trust Co. v. *Abbott*, 205 Mass. 279,

where an appreciable length of time was to elapse after the death before the payment over of the trust property.

And this point is carefully covered by the Court below in its opinion in this case:

> "It is not necessary to the validity of the excise on succession that an interest in the property pass directly from the grantor or settlor at the time of his death. . . . If the beneficiary under the instrument of gift succeeds to an interest in the property not previously enjoyed, which bears a distinct and necessary relation to the death of the grantor or settlor, that is a succession subjected to the excise by the terms of the statute."
>
> *Coolidge* v. *Commissioner,* 1929 Mass. Adv. Sh. 1831, 1835, 1836.

The language of the Massachusetts cases shows that the time of passage is not so important as the nature of the passage. It is not necessary, in order for the tax to be properly assessed, that the property pass immediately in point of time upon the death of the settlor. It is only necessary, for the purposes of the tax, that the passage of the property have a definite relation to the death of the grantor, that it cannot pass while the settlor is living, that the passage is not independent of the death of the settlor.

In this *Coolidge* case the deaths of the settlors were a condition precedent, without the occurrence of which the beneficiaries could not take.

There is no requirement that the property pass immediately upon the death of the grantor in order for a tax to be validly imposed. The words of the statute are not "to take effect . . . *upon* the death of the grantor," but rather "to take effect . . . *after* the death of the grantor." It is not the *time,* but the *nature,* of the succession which renders the passing subject to the imposition of the excise.

> *Boston Safe Deposit & Trust Co.* v. *Commissioner,* 1929 Mass. Adv. Sh. 1233, 1237.

The Court below in this *Coolidge* case pointed out many times that the *nature* of the Coolidge trust subjected the passing of property under it to the Massachusetts excise:

> "Plainly under the deed of July, 1907, the ultimate beneficiaries could not be determined with certainty until the death of both settlors. However unlikely, it nevertheless was possible that all or any number less than all of the five sons might predecease the survivor of the settlors. Which ones, if any of them, might so predecease could not be known until both settlors had died. No possession, enjoyment or title to the trust would ultimately vest in any son so predeceased or in his estate. *The interest of the sons surviving the settlors in the trust fund did not pass to them finally and irrevocably until and because of the death of both settlors.* The property conveyed to the trustees by the deed of trust was so limited that it vested in the sons who should survive both settlors in interest, possession and enjoyment only by reason of and upon the death of the survivor of the settlors. *This succession falls within the descriptive words of the statute.* The five sons of the settlors, who have become the ultimate beneficiaries of the trust, had no power of control individually or collectively over the trust fund while either of the settlors continued to live. They had no possession of it. That was vested exclusively in the trustees. They had no enjoyment of the trust fund, except as a vision of the future. They had no power of disposal of the whole or any part of the corpus of the trust estate. That power was enjoyed by the trustees alone. . . . Under the deed of trust while either settlor lived the sons had no unrestricted right to receive and use the proceeds of the property such as came to them upon the death of the last surviving settlor. *It is that succession to unrestricted and absolute title, in place of no possession or enjoyment whatever and a contin-*

gency as to title, which is made subject to the excise under the statute. The acquisition of the rights which accrued to the five sons on the death of the last settlor was a fundamental change in the nature of their relation to and interest in the trust. It replaced a contingency with a certainty. Full title, complete and unrestricted in every particular, did not vest in them until that event. By that event the actual transfer of the possession of the trust fund passed under the terms of the deed of July, 1907, from the trustees to the five sons and the full enjoyment thereof as to title and income for the first time became theirs. *It seems to us that this change constituted a succession.* The excise is not levied on mere enjoyment, possession or ownership: it is levied upon the assured and completed ripening of a more or less tenuous, dubious and immature right into actual possession, irrevocable enjoyment and full title. *We think that this constituted a succession which lawfully might be made subject to the excise by a statute enacted and effective before such succession took place.*" (Italics ours.)

Coolidge v. *Commissioner*, 1929 Mass. Adv. Sh. 1831, 1836, 1837.

In short, the fact of the deaths of Julia Coolidge and J. Randolph Coolidge was the "generating source" within the meaning of the opinion of Mr. Justice Sutherland in

Tyler v. *United States*, 281 U.S. 497,

from which the authority to impose the excises here in question came into being.

The earlier section of this brief (pp. 4-7), entitled "History of Legislation," shows clearly the intent of the Legislature to tax trusts of the nature of the Coolidge trust where the *generating source* of the succession, namely, the death of

the settlor, occurred after the enactment of the excise statute applicable. The Court below found properly that the passing of the property in 1925 was within the provisions of G.L., c. 65. The remainder of this brief discusses relevant decisions in State and United States Courts.

II.

THE IMPOSITION OF SUCH AN EXCISE HERE DOES NOT DENY TO THE APPELLANTS THE EQUAL PROTECTION OF THE LAWS NOR DEPRIVE THEM OF PROPERTY WITHOUT DUE PROCESS OF LAW NOR IMPAIR THE OBLIGATION OF A CONTRACT, UNDER THE CONSTITUTION OF THE UNITED STATES.

Such a succession tax upon grants made or intended to take effect in possession or enjoyment after the death of the grantor has long been held constitutional by Massachusetts and United States Courts.

The earliest case in Massachusetts on this subject pointed out that there is

> ". . . no difference in principle between property passing by a deed intended to take effect in possession or enjoyment on the death of the grantor and property passing by will. In either case it is the privilege of disposing of property after the death of the grantor or testator and of succeeding to it which is taxed, though the amount of the tax is determined by the value of the property. The constitutionality of the law in regard to taxing property passing by will was fully considered in *Minot* v. *Winthrop*, 162 Mass. 113, and that case, we think, is decisive of this."
>
> *Crocker* v. *Shaw*, 174 Mass. 266.

This early case has been consistently followed in Massachusetts. The succession to property by reason of death has been recognized for many years by the Massachusetts

Court as a commodity which rightly may be made subject to an excise.

Minot v. *Winthrop*, 162 Mass. 113, 115-122.
Callahan v. *Woodbridge*, 171 Mass. 595, 597.
Crocker v. *Shaw*, 174 Mass. 266, 267.
New England Trust Co. v. *Abbott*, 205 Mass. 279.
Minot v. *Treasurer and Receiver General*, 207 Mass. 588.
Attorney General v. *Stone*, 209 Mass. 186.
State Street Trust Co. v. *Treasurer and Receiver General*, 209 Mass. 373.
Burnham v. *Treasurer and Receiver General*, 212 Mass. 165.
Clarke v. *Treasurer and Receiver General*, 226 Mass. 301, 305.
Magee v. *Commissioner of Corporations and Taxation*, 256 Mass. 512, 515, 516.
Saltonstall v. *Treasurer and Receiver General*, 256 Mass. 519, 523, 524.
Boston Safe Deposit & Trust Co. v. *Commissioner*, 1929 Mass. Adv. Sh. 1233.
Coolidge v. *Commissioner of Corporations and Taxation*, 1929 Mass. Adv. Sh. 1831 (this case).

It is far too late for counsel to argue that the Massachusetts succession tax upon property passing under trusts made or intended to take effect in possession or enjoyment after death is unconstitutional.

The United States Supreme Court has also established the principle that a State may impose an excise upon the privilege of the donee to *succeed* to property in possession and enjoyment upon the death of the grantor, as well as upon the privilege of the grantor so to *transfer* it, whether occasioned by death,

Stebbins v. *Riley*, 268 U.S. 137,

or effected by deed.

Keeney v. *New York*, 222 U.S. 525.
Chanler v. *Kelsey*, 205 U.S. 466.
Nickel v. *Cole*, 256 U.S. 222.

The principle is thus stated in the *Stebbins* case:

> "The subject matter of an inheritance taxing statute may be either the transmission, or the exercise of the legal power of transmission, of property by will or descent . . . or it may be the legal privilege of taking property by devise or descent . . . There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. *Each, as we have seen, is the subject of taxation.*" (Italics ours.)

Stebbins v. *Riley*, 268 U.S. 137, 141, 144.

In the *Keeney* case, holding an excise on a succession effected by deed constitutional, Mr. Justice Lamar went so far as to say that even

> "where the grantor makes a transfer of property to take effect on the death of a third person, it might . . . be taxed as a devolution or succession."

Keeney v. *New York*, 222 U.S. 525, 535.

And the justice went on to point out that those grants which were to take effect after the death of the grantor were even more testamentary in character, and taxable.

In a recent case Mr. Justice Sutherland expressed the same principle:

> "Death duties rest on the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission *or receipt of property* by death

which is the subject levied upon by all death duties.' *Knowlton* v. *Moore*, 178 U.S. 41, 56, 57." (Italics ours.)

Tyler v. *United States*, 281 U.S. 497.

In another case this Court laid down the principle that a State may constitutionally impose an excise upon the passing of property until the actual receipt of property by the beneficiary.

Cahen v. *Brewster*, 203 U.S. 543.

The element of succession being a taxable commodity, the imposition of an excise thereon has been held constitutional by a long line of United States Supreme Court decisions.

Carpenter v. *Pennsylvania*, 17 How. 456.
Orr v. *Gilman*, 183 U.S. 278.
Cahen v. *Brewster*, 203 U.S. 543.
Chanler v. *Kelsey*, 205 U.S. 466.
Moffitt v. *Kelly*, 218 U.S. 400, 405.
Nickel v. *Cole*, 256 U.S. 222.
Wachovia Bank & Trust Co. v. *Doughton*, 272 U.S. 567, 573.
Saltonstall v. *Saltonstall*, 276 U.S. 260.

Mr. Justice McReynolds stated in the *Wachovia* case:

"In *Orr* v. *Gilman*, 183 U.S. 278, and *Chanler* v. *Kelsey*, 205 U.S. 466, this court held that by an act passed subsequent to the instrument which created a power of appointment New York might tax its execution without violating the Fourteenth Amendment."

Wachovia Bank & Trust Co. v. *Doughton*, 272 U.S. 567, 573.

The principle that an excise may be imposed upon the privilege of succession at any time before that privilege is

fully exercised extends to and embraces cases where the excise is imposed by an act passed after the interest has vested in law but before it has taken effect in possession and enjoyment.

Carpenter v. *Pennsylvania*, 17 How. 456.
Cahen v. *Brewster*, 203 U.S. 543.
Moffitt v. *Kelly*, 218 U.S. 400.
Nickel v. *Cole*, 256 U.S. 222.
Saltonstall v. *Saltonstall*, 276 U.S. 260.

But it will be argued that the Coolidge trust is one where the settlors retained no power of control and no beneficial interest, where nothing happened at the death of the settlors, and that, therefore, the passing of the property which is here taxed bore no rational relationship to the death of the settlors, and that the excises are unconstitutional. It will be argued that recent United States Supreme Court decisions are authorities contrary to the contentions of the Commonwealth, and that the absence of a power of revocation and the absence of the retention of any beneficial interest in the settlors makes the excises on the Coolidge trust invalid.

Two cases which will be relied upon by the appellants in support of that argument are

Nichols v. *Coolidge*, 274 U.S. 531.
Reinecke v. *Northern Trust Co.*, 278 U.S. 339.

The case of *Nichols* v. *Coolidge* involved in its Federal estate tax aspect the identical trust here being considered in its Massachusetts succession tax aspect. This Court held that the Federal estate tax on the Coolidge trust was unconstitutional as contrary to the Fifth Amendment. The language of the Court was strong, but it is significant that Mr. Justice McReynolds, in his opinion, quoted the following from the case of *Edwards* v. *Slocum*, 264 U.S. 61, 62:

> "This is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent . . . It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in [*Knowlton* v. *Moore*,] 178 U.S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of death,' "

and pointed out that

> "The exaction is not a succession tax like the one sustained by . . . *Keeney* v. *New York*, 222 U.S. 525. The right to become beneficially entitled is not the occasion for it."

Thus it was apparent in the language of the opinion in the case of *Nichols* v. *Coolidge* itself that this Court distinguished a transfer tax from a succession tax. It is too clear for discussion, and has already been pointed out in this brief, that the Massachusetts excise is a succession tax. The *Coolidge* case in its Massachusetts succession tax aspect, therefore, is clearly distinguishable from the *Coolidge* case in its Federal estate tax aspect.

The case of *Reinecke* v. *Northern Trust Co.* is of considerable importance, placing, as it does, a decided emphasis upon the presence or absence of a power of revocation in determining whether a trust *inter vivos* is taxable or not under the Federal estate tax law. In that case seven trusts were involved, in two of which (hereinafter called the two trusts) the power to revoke had been retained by the settlor alone and in five of which (hereinafter called the five trusts) the power to revoke had been retained by the settlor only with the concurrence of one or more of the beneficiaries. This Court held that the two trusts were taxable and the five trusts were not taxable, regardless of the fact that the two trusts were executed prior to the taxing statute and

the five trusts were executed subsequent to the taxing statute. Mr. Justice Stone, who delivered the opinion, said:

> "A transfer . . . subject to a power of revocation in the transferor, terminable at his death, is not complete until his death . . . Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute."

The *Reinecke* case involved only a matter of statutory construction, Mr. Justice Stone holding that the language of the Federal estate tax statute, "to take effect in possession or enjoyment at or after his death," properly construed, did not include within its terms the five trusts. The case is important here because of the ruling that a power to revoke concurrently with another person does not leave the power of control in the transferor. The five trusts were therefore declared in effect to be without any power of control by the transferor.

Once again, however, it must be remembered that this Court, in the *Reinecke* as in the *Coolidge* case, was dealing with the Federal estate tax, a tax upon the right to transfer. In the consideration of such a tax it is of the utmost importance to determine whether or not the power of control is left with the transferor. If the transferor has no beneficial interest and has no power of control, nothing passes from him at the time of his death. The *Coolidge* and *Reinecke* cases are by no means conclusive of this case at bar.

This distinction between the underlying theories of the Federal and Massachusetts taxes was further clarified by this Court in the decision of

Saltonstall v. *Saltonstall*, 276 U.S. 260.

In that case the United States Supreme Court was concerned with the Peter C. Brooks trust, made between 1905 and 1907 by Peter C. Brooks, providing that the income

should be paid to him for life and upon his death over. Mr. Brooks retained the power to revoke, with the concurrence of one trustee. Before his death Mr. Brooks provided that the income should be accumulated and added to the principal, so that at the time of his death his interest in the trust was terminated, except for his power with the concurrence of one trustee to alter or terminate. This Court had the validity of the Massachusetts succession tax before it. The tax was held to be valid, and the language of Mr. Justice Stone in that opinion clearly points out the fundamental difference between the theory of the Federal estate tax upon the right to transfer and the theory of the Massachusetts succession tax upon the right to receive. His language is quoted *supra*, pages 10, 11, in this brief.

Mr. Justice Stone has, moreover, in a recent United States Supreme Court decision, explained further his decision in *Saltonstall* v. *Saltonstall*. In the case of

> *Chase National Bank* v. *The United States*, 278 U.S. 327,

Mr. Justice Stone says:

> "In *Saltonstall* v. *Saltonstall*, 276 U.S. 260, a tax had been imposed . . . on the succession to a remainder interest which had vested under a trust created before the enactment of the taxing act. It was objected that the tax was void as retroactive and hence in conflict with the Fourteenth Amendment . . . But by the provisions of the trust indenture a power of disposition of the remainder had been reserved to the settlor to be exercised by him at any time during his life, with the concurrence of one trustee, and we held that the freeing of the remainder of the possibility of the exercise of that power, through its termination by the death of the settlor, effected a transfer which was the appropriate subject of a succession tax and that the tax was not

> retroactive since the termination of the power which was prerequisite to the complete succession did not occur until after the enactment of the statute. . . ."

The *Chase National Bank* case held the proceeds of insurance policies to be properly included in the gross estate of the decedent under the Federal estate tax statute where the decedent had retained the power to change the beneficiary.

Thus Mr. Justice Stone has settled any argument as to what the *Saltonstall* case decided. His language in the *Chase National Bank* case shows that this Court considers the *Saltonstall* case authority for the proposition that the Massachusetts succession tax was not invalid as retroactive so long as the privilege of succession had not been fully exercised until after the enactment of the taxing statute. The *Saltonstall* case, therefore, can no longer be limited to the peculiar facts dealing with the 1909 power of appointment statute.

It may be argued that the *Saltonstall* case does not go as far as the Commonwealth wishes this Court to go, since in the *Saltonstall* case there was a power to revoke. But the *Reinecke* case has said that a power to revoke depending upon the concurrence of another does not leave a power of control in the settlor sufficient for taxing purposes. The *Saltonstall* case, therefore, did not deal with a trust with absolute power of revocation. It is significant that Mr. Justice Stone pointed out in the *Chase National Bank* case that it was important that a succession tax was involved in the *Saltonstall* case rather than a transfer tax, quoting the following from his previous decision:

> "A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen* v. *Wisconsin*, 240 U.S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another,"

and commenting on the quotation as follows:

> "That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke* v. *Northern Trust Company,* decided this day."

These words of Mr. Justice Stone in the *Chase National Bank* case are of vital importance. They show that the reason the tax in the *Saltonstall* case was held valid and the tax in the *Coolidge* case was held invalid was entirely because of the difference in theory of the two taxes involved in the cases. Mr. Justice Stone clearly intimates that, if the Brooks trust involved in the *Saltonstall* case had been before him in its Federal estate tax aspect, he would have been compelled to follow the *Coolidge* case, since the power to control, with the concurrence of another, which existed in the *Saltonstall* case, was no better for the purposes of a Federal tax than the absence of a power of revocation in the *Coolidge* case. In fact, the Federal estate tax upon the Brooks trust was held invalid by the District Court for the District of Massachusetts in the case of

Hill v. *Nichols,* 18 Fed. (2d) 139,

and no appeal appears to have been taken. The Federal District Court judge felt unable to distinguish the case from *Nichols* v. *Coolidge,* pointed out that the power to revoke reserved to Mr. Brooks was not an unqualified one, since he could only exercise this right with the consent of one or more of his trustees, and held that at the death of Mr.

Brooks he had no transmissible interest in the property and that the Federal estate tax was invalid.

The theory of the *Saltonstall* case is that the Massachusetts tax is on the privilege of the beneficiaries to receive. That depends not at all upon whether or not there is a power to revoke in the settlor, either alone or dependent upon the concurrence of another. What the settlor had when he died is of no consequence in determining whether or not a succession tax is validly imposed. The validity of such a succession tax depends solely upon what the beneficiaries received and whether such receipt can be rationally related to the death of the settlors from whom the property originally came.

We are here concerned with taxes upon the right to receive. If the property which was received by the Coolidge children on November 10, 1925, came from the settlors originally, and if the beneficiaries upon the death of the settlors received something, then the Massachusetts succession taxes are properly and constitutionally imposed. It is not essential for a succession tax that the transferor shall have retained any interest or the power to control. It is essential only that the beneficiaries shall have received something which came originally from the settlors in connection with whose death the tax is assessed.

In the light of the *Reinecke* and *Chase National Bank* cases, with their emphasis upon the power to control in the case of a tax on the right to transfer and with their holding that a power to revoke, dependent upon the assent of another, did not leave the power to control in the transferor, the *Saltonstall* case is clearly established as authority in support of the Commonwealth in the issues here presented. In the *Saltonstall* case there was no power of control in Mr. Brooks. The trust was executed prior to the enactment of the Massachusetts taxing statute. Mr. Justice Stone held that there was no retroactive feature, since it was a tax upon the right to receive and the privilege of succession

was exercised long after the enactment of the taxing statute, and that the Massachusetts tax was valid although Mr. Brooks had no beneficial interest in the income at the time of his death. The *Saltonstall* case is on all fours with the present *Coolidge* case.

The Court below recognized this distinction between a *transfer* tax and a *succession* tax in these words:

> "The case at bar is distinguishable from *Shwab* v. *Doyle*, 258 U.S. 529, *Shukert* v. *Allen*, 273 U.S. 545, *Nichols* v. *Coolidge*, 274 U.S. 531, *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 345, 347, and *Chase National Bank* v. *United States*, 278 U.S. 327. In each of those cases the tax under consideration was the Federal estate tax levied upon the property of the deceased transmitted at his death. That is a tax levied upon a subject quite different from the succession to property by a beneficiary, which is the subject of the present excise."
>
> *Coolidge* v. *Commissioner*, 1929 Mass. Adv. Sh. 1831, 1839.

Transfer taxes rather than succession taxes were involved in many of the decisions cited in the brief of the appellants, including among others the United States Supreme Court cases of

May v. *Heiner*, 281 U.S. 238.
Reinecke v. *Northern Trust Co.*, 278 U.S. 339.
Chase National Bank v. *United States*, 278 U.S. 327.
Untermyer v. *Anderson*, 276 U.S. 440.
Blodgett v. *Holden*, 275 U.S. 142.
Nichols v. *Coolidge*, 274 U.S. 531.

Such cases are not in point here, where a succession tax has been imposed.

The Massachusetts statute here involved has been carefully construed in favor of the appellee by a long line of

Massachusetts and United States Supreme Court decisions. Decisions of other State Courts dealing with different statutes have no such probative value here.

It is submitted that the contention of the respondent is not only borne out by a long line of decisions in Massachusetts and by the United States Supreme Court decisions, but is also correct in principle. Taking the present case to illustrate, the Massachusetts taxes here assessed were excises upon the privilege on the part of the five Coolidge children to receive possession on November 10, 1925, of property of a trust created by J. Randolph Coolidge and Julia Coolidge. The Coolidges may have had no transmissible property at the time of their deaths and no power of control, and so a tax upon the right to transfer would necessarily be invalid. That is not the point. The point is whether the five Coolidge children received anything upon the deaths of the Coolidges. That they did receive something, it is submitted, is too clear for argument. The Commonwealth of Massachusetts has a right under its own and under the Federal Constitution to levy a tax upon that succession.

The theory of the appellants in their brief seems to be that, except where there is an attempted evasion of the tax or except where there is a power to revoke, the only basis for an excise tax on property passing under a deed is that the creation of future interests is a privilege which the State may withhold or confer as it sees fit. They argue that the future interests here involved were created before the enactment of the taxing statute, and that therefore the taxes interfered with vested interests and were invalid.

The appellee does not accept that theory. Something more is involved than the mere creation of future interests. The appellee's theory of a death excise is that it can constitutionally be imposed as long as the property passing by reason of the death has not reached its final resting place. An estate tax purports to tax the passage only until the

property leaves the control of the decedent. A succession tax, however, such as is involved here, goes farther and purports to tax the passage of the property upon its receipt in possession by the ultimate beneficiary.

Nor can it successfully be claimed, as it is in the appellants' brief, that the taxes are discriminatory and deny equal protection of the laws. The taxes here at issue are rationally related, as they should be, to the deaths of the persons from whom the property came. The case of *Keeney* v. *New York*, 222 U.S. 525, 536, is a complete answer to argument II in the appellants' brief, despite their protestations to the contrary. The distinctions made by the Massachusetts Court below are reasonable and in accordance with precedents established by this Court.

The case of *Nichols* v. *Coolidge*, 274 U.S. 531, leaves unshaken *Cahen* v. *Brewster*, 203 U.S. 543, and the line of cases ending with *Saltonstall* v. *Saltonstall*, 276 U.S. 260, which hold that a *succession* tax may be imposed on the donee at any time before the privilege of succession is completely exercised by the taking effect in possession or enjoyment. Those cases govern the case at bar.

Conclusion.

The taxes here involved are succession taxes. They are excises on the privilege of the five Coolidge children to receive the trust property on November 10, 1925. The children could not receive the property in possession until after the deaths of the settlors, Julia and J. Randolph Coolidge. The date of execution of the Coolidge trust is immaterial as long as the succession took place after the enactment of the taxing statute, as it did here. The statute was passed in 1920; the succession took place in 1925, after deaths occurring in 1921 and 1925. The property came from Julia and J. Randolph Coolidge originally. All the essentials to a valid succession tax are present. Massachusetts and

United States Court decisions uphold the validity and constitutionality of the taxes here in issue.

We therefore respectfully submit that the final decrees of the Probate Court for the County of Norfolk, Commonwealth of Massachusetts, should be affirmed.

Respectfully submitted,

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